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Recommended Citation

Brief of Appellee, *West Valley City v. Cindy Lou Young*, No. 990575 (Utah Court of Appeals, 1999).
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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case No. 990575-CA
v.	:	
	:	Priority No. 2
CINDY LOU YOUNG,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF THE APPELLEE

Appeal from the Third Judicial District Court,
West Valley Department,
in and for Salt Lake County, State of Utah;
the Honorable Anthony B. Quinn

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FILED
Utah Court of Appeals

JAN 21 2000

Julia D'Alesandro
Clerk of the Court

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STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to §78-2a-3(2)(e), Utah Code Annotated.

STATEMENT OF THE ISSUES

ISSUE I. IS YOUNG'S "EVIDENCE" OF INEFFECTIVE ASSISTANCE OF COUNSEL ADMISSIBLE BEFORE THIS COURT?

Because the trial court did not hold an evidentiary hearing in this case, and Young did not file a motion for a remand pursuant to Rule 23B, Utah R. App. P., the issues of this case should be decided on the trial record. However, Young bases much of her brief on post-trial evidence which she submitted by way of affidavits supporting a motion for a new trial. Because of the nature of this evidence, its use on appeal should be considered under the appropriate rule of evidence regarding the admissibility of hearsay, Rule 802, Utah Rules of Evidence. The evidence should also be subject to the law prohibiting the submission of new evidence on appeal. *State v. Bredehoft*, 966P.2d 285 (Utah App. 1998).

ISSUE II. DID THE DEFENDANT RECEIVE COMPETENT LEGAL REPRESENTATION AT TRIAL?

Utah has adopted the two prong *Strickland* test for analyzing claims of ineffective assistance of counsel. *State*

v. Perry, 899 P.2d 1332 (Utah App. 1995); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Under the *Strickland* test, the appellant must first demonstrate that her legal counsel's representation fell below an objective standard of reasonableness. The appellant must then show that, but for her counsel's unprofessional errors there is a reasonable probability that the outcome of the trial would have been different. To prevail, the appellant must meet both prongs of the *Strickland* test. *Fernandez v. Cook*, 870 P.2d 870 (Utah 1993).

The appropriate standard of review of trial counsel's choices regarding trial strategy is deference, even if the choices are incorrect in hindsight. *State v. Tennyson*, 850 P. 2d 461 (Utah App. 1993). The appropriate standard of review of a trial court's ruling on a motion for a new trial based upon a claim of ineffective assistance of counsel is deference to the trial courts findings of fact, but review of its legal conclusions for correctness. *Perry*, at page 1238

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCE, AND RULES**

Amendment VI, United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense. Rule 802., Utah Rules of Evidence.

Hearsay Rule. Hearsay is not admissible except as provided by law or by these rules.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case involves a prosecution and conviction for a violation of Section 41-1a-201, U.C.A., Registration Required and Section 76-5-102.4, U.C.A., Assault Against a Peace Officer.

COURSE OF PROCEEDINGS

On or about February 13, 1998, Cindy Lou Young ("Young") was arrested and booked into jail for Assault Against a Peace Officer, Expired Vehicle Registration, and Violation of a Protective Order, Section 76-5-108 U.C.A. (Record, page 1.).

An information charging those three misdemeanor crimes was filed with the court on March 27, 1998. (Record, page 9.) On October 18, 1998, an Amended Information was filed which dropped the charge of Violation of a Protective Order. (Record, page 42.) On October 18, 1998, a jury trial was held before the Honorable Anthony B. Quinn of the Third District Court. Young was represented at trial by David R. Maddox.

DISPOSITION IN TRIAL COURT

At trial, the jury convicted Young of Assault Against a Peace Officer and Expired Vehicle Registration. (Record, page 46.) Young was sentenced to pay a fine of \$500 and was sentenced to a jail term of 45 days, which was suspended. She was also put on probation to the court for a period of 12 months and required to attend anger management classes. (Record, page 73.)

On January 19, 1999, Young's new counsel, Delano S. Findlay, filed a Motion for a New Trial. (Record, page 108.) The basis for this motion was ineffective assistance of counsel. On March 2, 1999, a hearing on the motion was held before Judge Paul Maughan. The hearing before Judge Maughan consisted of the arguments of counsel and was not an evidentiary hearing. (Hearing Transcript, pages 5-6.) Judge

Maughan issued his Conclusions of Law and Order on June 21, 1999, which denied Young's Motion for a New Trial. (Record, page 146.)

Notice of Appeal in this case was filed on July 1, 1999. (Record, page 167.)

STATEMENT OF THE FACTS

The City accepts the Statement of Facts set forth in Young's brief with the following exception.

The "facts" set forth in paragraphs 8, 13, 14, and 18 are not facts based upon the record of this case. Each of these "facts" presented by Young is based solely or partially on affidavits presented to Judge Maughan in support of Young's Motion for a New Trial. Such affidavits are inappropriate for use in this appellate proceeding. *State v. Bredehoft*, 966 P.2d 285 (Utah App. 1998). In addition, while all of the affidavits contain hearsay, the Affidavit of Counsel (Record, pages 110-112.), is virtually entirely hearsay. It relates the purported testimony of a potential witness, as told to Young's appellate counsel. Such hearsay statements are inadmissible under Rule 802, Utah Rules of Evidence.

SUMMARY OF THE ARGUMENTS

I. MUCH OF YOUNG'S EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT ADMISSIBLE EVIDENCE BEFORE THE COURT OF APPEALS.

Much of the evidence upon which Young bases her appeal is contained in three affidavits and their attachments. The affidavits are of the Appellant Young (Record, pages 79-107.), her counsel on appeal Delano S. Findlay (Record, pages 110-114.), and a trial witness Bobbi Johnson (Record, pages 115-117.). The evidence contained in these affidavits were not taken as evidence before the trial court, contain hearsay, and contain evidence that would be considered to be new evidence on appeal. These affidavits should be disregarded by the Court of Appeals and the issue of ineffective assistance of counsel should be treated as if raised for the first time on appeal.

II. YOUNG RECEIVED THE BENEFIT OF A VIGOROUS AND COMPETENT DEFENSE WHICH RESULTED IN A JUST AND FAIR TRIAL.

Young's argument of ineffective assistance of counsel must be measured against the two prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). That test requires that Young demonstrate that her trial counsel's representation fell below an objective

standard of reasonableness and that, but for her counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different. *Fernandez v. Cook*, 870 P. 2d 870 (Utah 1993). Young cannot satisfy either prong of the *Strickland* test.

First, the perceived errors that she asserts are all legitimate trial strategy decisions made by her trial counsel. Such decisions are given great deference by appellate courts. *State v. Tennyson*, 850 P.2d 461 (Utah App. 1993) ("If a rational basis for counsel's performance can be articulated, we will assume counsel acted competently."). Second, Young has not shown that the outcome of the trial would have likely been different had her trial counsel presented the "additional evidence" she believes he should have presented. To the contrary, almost all of her "additional evidence" relates to her arrest and to the aftermath of being sprayed with pepper spray. This is unrelated to the core of the City's case, since the assault on Officer Lozano consisted of Young's kicking and fingernail digging which occurred prior to the use of pepper spray or the arrest.

DETAIL OF THE ARGUMENTS

I. MUCH OF YOUNG'S EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT ADMISSIBLE EVIDENCE BEFORE THE COURT OF APPEALS.

Virtually all of the evidence upon which Young rests her argument of ineffective assistance of counsel are based upon evidence which she submitted to the trial court with her Motion for a New Trial. This evidence was submitted by affidavits from the Appellant Young (Record, pages 79-107.), her counsel on appeal Delano S. Findlay (Record, pages 110-114.), and a trial witness Bobbi Johnson (Record, pages 115-117.). These affidavits contained information that was not taken as evidence before the trial court (Hearing Transcript, Pages 5-6.), contain hearsay, and contain evidence that would be considered to be new evidence on appeal. These affidavits should not form the basis for a decision of this Court and the issue of ineffective assistance of counsel should be treated as if raised for the first time on appeal.

The status of this case before the Court Of Appeals is somewhat unique. Usually ineffective assistance of counsel arguments are either made following a Rule 23B, Utah R. App. P., Motion to Remand for an evidentiary hearing before the trial court; following an evidentiary hearing on a post trial

motion; following an evidentiary hearing on a habeas corpus petition; or they are sometimes heard for the first time on appeal when the record below is considered to be adequate. This case does not fall neatly into any of these categories.

In this case, there was a motion for a new trial heard by the trial court below. However, the trial court did not conduct an evidentiary hearing on the motion. Therefore, Young's trial counsel was not questioned regarding either his strategic decisions, or his investigations and preparations for trial. The result is the bare trial record accompanied by affidavits and proffers of evidence made before the court at the motion hearing.

These affidavits and proffers are not appropriately considered to be evidence in the appellate process. In *State v. Bredehoft*, 966 P.2d 285 (Utah App. 1998), the Court of Appeals did not allow the appellant to rely on unsubstantiated allegations contained in affidavits submitted to support a Rule 23B motion. That is very analogous to the situation in this case. The affidavits referred to by Young in her brief were submitted in support of a Motion for a New Trial, based upon an ineffective assistance of counsel claim. This is virtually identical to the *Bredehoft* case and for the same

reasons articulated in that case the affidavits should not be considered in this case. *Bredehoft*, at page 290.

A second reason for disregarding the information in the Affidavit of Counsel (Record, pages 110-114.), is the fact that it is replete with inadmissible hearsay. For example, in paragraphs 2, 3, 4, 5, 6, and 7 of his affidavit, counsel describes EMT Glezos' recollection of the incident as told to him by Glezos over the telephone. This information is hearsay and is not admissible as evidence in either this Court or the trial court pursuant to Rule 802, Utah Rules of Evidence.

Finally, much of the information relied upon by Young is "new" evidence before this Court. The information contained in the affidavits was not part of the testimony at trial and was not produced at an evidentiary hearing before the trial court. It is well established that appellate courts of this state will not consider new evidence on appeal. *Bredehoft*, at P.290.

The information contained in the affidavits should be disregarded for purposes of this appeal and the Court should treat the issue of ineffective assistance of counsel as if raised for the first time on appeal.

II. YOUNG RECEIVED THE BENEFIT OF A VIGOROUS AND COMPETENT DEFENSE WHICH RESULTED IN A JUST AND FAIR TRIAL.

Young argues that she received inadequate assistance of counsel at trial. This argument is based on the underlying concept that her counsel's performance was so deficient that she was deprived of counsel for her defense as guaranteed by the Sixth Amendment of the United States Constitution. A close review of the facts below revealed that her argument is without merit.

Utah has adopted the analytical framework set forth by the United States Supreme Court for deciding ineffective assistance of counsel claims under the Sixth Amendment. *State v. Perry*, 899 P.2d 1232 (Utah App. 1995). This framework is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052(1984). In *Strickland*, The United States Supreme Court set forth a two prong test for analyzing ineffective assistance of counsel claims. To satisfy the first part of the *Strickland* test, a defendant must show that the trial counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. 668, 688. The second prong of the test is satisfied if the defendant can show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. 668, 694; *State v. Baker*, 963 P.2d 801 (Utah App. 1998). If either prong of the *Strickland* test is not established, defendant's claim will fail. *Strickland*, 466 U.S. 668, 687; *State v. Tennyson*, 850 p.2d 461 (Utah App. 1993).

As is set forth below, Young has failed both prongs of the test. The analysis, which assumes that Young's affidavits and proffers are admissible evidence, is set forth below.

A. THE ACTIONS OF YOUNG'S TRIAL COUNSEL INVOLVED TRIAL STRATEGY DECISIONS THAT ARE OBJECTIVELY REASONABLE.

Utah law creates a strong presumption of competence by defense counsel. In reviewing defense counsel's actions, the court does not need to come to a conclusion that counsel had a specific strategy in mind it simply needs to be able to articulate some plausible strategic explanation for defense counsel's actions. *Tennyson*, at P.468.

The presumption of competence is so strong that the Utah Court of Appeals has stated: "If a rational basis for counsel's performance can be articulated, we will assume counsel acted competently. Indeed, authority from this court supports the notion that an ineffective assistance claim

succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." *Tennyson*, at P.468. It is also clear from the case law that "Although defense counsel must vigorously represent his or her client, 'counsel [is] not required to develop every conceivable defense that [is] available.'" *State v. Baker*, 963 P.2d 801 (Utah App. 1998) (citation omitted).

Young's first allegation of inadequate representation is that her trial counsel failed to interview and call certain witnesses that she believed would corroborate her testimony. These witnesses were Anthony Glezos, an EMT with the West Valley City Fire Department, the tow truck driver who had impounded her van, and her neighbor Bobbi Johnson. In each case, there is a plausible strategic explanation for trial counsel's actions.

First, with respect to EMT Glezos, all information before the court with respect to Glezos consists of hearsay contained in an affidavit submitted by Young's appellate counsel. (Record, pages 110-114.) Assuming this hearsay to be accurate, it appears that Glezos was subpoenaed to appear (Record, pages 40-41.) and did speak with trial counsel. Following Glezos discussion with trial counsel, trial counsel

made the conscious decision to not call Glezos as a witness. Because of a lack of the factual evidence in the record, the reason for Glezos being excused cannot be conclusively determined. However, there are several plausible strategic reasons why this occurred. It appears from both the proffer of evidence contained in the affidavit (Record, pages 110-114.) and from Officer Lozano's testimony at trial (Trial Transcript, page 96.), that Glezos may have testified that he observed the injuries to Officer Lozano's fingers, that he gave advice on how to treat the injuries, and that he provided Lozano with a bandage (Hearing Transcript, page 12.). Given the fact that Young testified that she did not inflict any injuries to Lozano's hand, this portion of Glezos testimony had the potential to support the prosecution's case. Therefore a decision not to call Glezos as a witness is legitimately within the realm of trial strategy.

With respect to the tow truck driver, the record is devoid of any evidence concerning trial counsel's investigation or decisions involving the tow truck driver. Young states in her brief that trial counsel did not interview the tow truck driver prior to the beginning of the trial. (Appellant's Brief, p.14.) However, that statement is

unsupported by any information or evidence contained in the record. Since it is obvious that the tow truck driver arrived a considerable time after the assault had occurred, trial counsel may have determined that the driver had little relevant evidence to add to Young's case.

The evidence regarding the testimony of Bobbi Johnson indicates that she was subpoenaed to trial and she was interviewed prior to trial by trial counsel. Unfortunately for Young, Johnson's testimony fell apart under cross-examination. There is simply no indication from the record that Johnson's testimony would have been different or more coherent had she spent more time being interviewed by trial counsel. Also, Johnson did not observe the assault on Officer Lozano. Her testimony was that she started watching after Young had been pepper sprayed. (Trial Transcript, pages 112, 117.)

Young relies on the case of *State v. Templin*, 805 P.2d 182 (Utah 1990), for the proposition that Young's trial counsel failed to adequately investigate the witnesses. This reliance is misplaced. In *Templin*, the court found that the defendant's counsel had not spoken with or subpoenaed several key witnesses. That is not the case here. In this case,

Young's trial counsel subpoenaed both Bobbi Johnson and EMT Glezos. (Record, pages 38-41.) Johnson testified at trial and EMT Glezos was excused after being interviewed by trial counsel, clearly a strategic decision. The only mystery is the tow truck driver, and the record contains no evidence as to any discussions trial counsel may have had with the tow truck driver or whether or not he was subpoenaed to trial. Unlike the counsel in *Templin*, Young's trial counsel subpoenaed and interviewed the appropriate witnesses.

Young's second assertion of ineffective assistance of counsel relates to the allegation that trial counsel failed to investigate the effects of pepper spray thereby depriving Young of an alternative explanation for her resistance to being handcuffed. This allegation is simply not supported by the record.

There was evidence presented through both the direct testimony and cross-examination of Officer Kishiyama regarding the effect of pepper spray. (Trial Transcript, pages 57-59.) Also, Young testified about the effect of the pepper spray on her. (Trial Transcript, pages 141-142.) Trial counsel argued the exact issue now being raised as an omission on appeal

during both his opening and closing arguments. During opening argument he stated:

"My client did struggle at that point because of the affect of the mace. In fact, she'll testify, she has no clear recollection of anything that happened since the time she was maced in the face because of the pain that she was in from the chemical burning until she was on the grass with another police officer standing over her at some point later. She doesn't know what happened in between." (Trial Transcript, page 48.)

During closing argument, trial counsel stated:

"At that point, things escalate one step further. My client says that while they were bent over, the officer reached around and, blam, nailed her with the pepper spray, the OC spray. Got it in her eyes and her mouth and everything. It was a heavy dose. And, frankly, she doesn't remember a whole lot after that. She was nauseated, she was sick, she was blinded, she had mucus running all over her face, tears coming out of her eyes. And that is what the officer said happens when you pepper spray somebody." (Trial Transcript, page 200.)

Also during closing argument defense counsel stated:

"There's two very real alternatives about what happened here. And under the second alternative of what happened, did she assault a peace officer? Did she make an attempt with unlawful force or violence to do bodily injury to another? Or was she reacting after being pepper sprayed in the face and flailing around because of the burns and pain, the excruciating pain, she was feeling in her face? Is that what was going on?" (Trial Transcript, page 206.)

Trial counsel also stated "and my client froze up and grabbed the keys. That's not an assault. And everything else occurred after she got pepper sprayed". (Trial Transcript page 207.) Any additional evidence regarding the effects of pepper spray would have merely added to the similar evidence already before the jury.

Young's third allegation of error is that her trial counsel failed to put on evidence concerning the charge of violation of a protective order that had been filed by Officer Lozano and then dismissed prior to trial. According to her argument, informing the jury of the filing of this charge which was later dismissed may have raised questions in the minds of the jurors regarding Lozano's mind set at the time of arrest.

The record is devoid of any evidence regarding trial counsel's investigation or involvement in the dismissal of this charge. However, there is an obvious strategic reason for not raising this issue before the jury. According to the evidence proffered by Young's appellate counsel at the motion for a new trial, he indicates that the protective order was issued as a result of a physical altercation with her ex-husband which he described as "this little so called slapping

incident, which there was a little slapping, for vulgar language, on the mouth, not very hard or forceful, but there was a little slap". (Motion Transcript, page 27.) This information obviously would have come to light and, although the protective order was later dismissed, it is clear that a protective order had been issued by the District Court. Trial counsel was left with the decision to weigh the benefit of showing a potential bias by Lozano, against the potential harm of admitting that his client had been involved in a previous physical altercation that had resulted in the issuance of a court order against her. Such a decision clearly falls within the realm of trial strategy and should not be questioned on review. This is particularly true given the extremely slight evidentiary value of this evidence. Since the charges were filed after the incident, it is only evidence of Lozano's mind set after she had been assaulted by Young, not before.

The final error asserted by Young is that her trial counsel's failure to plead to the Expired Registration charge prior to trial painted her in an unfavorable light before the jury. Once again, there is an obvious strategic reason for trial counsel's action. It is entirely plausible that it was trial counsel's intention to allow the jury the option of

convicting Young on the lesser charge of Expired Registration while finding her not guilty of Assault on a Police Officer. With both charges available to them, the jury had the option of reaching a verdict in essentially what would be the "middle ground". By pleading to the Expired Registration charge prior to trial, Young would be forcing the jury into an all or nothing decision. This trial strategy makes perfect sense when one considers that all of the evidence regarding Expired Registration would most likely been presented at trial anyway, since the City would have had to provide a basis for the traffic stop and explained the events leading up to the assault by Young.

Young's argument that she may have appeared to the jury to be unreasonably fighting all of the charges is also in conflict with her testimony at trial. At trial she did not dispute the registration charge but instead readily admitted that she had committed a violation. (Trial Transcript, pages 148-149.)

B. THE JURY'S VERDICT IS STRONGLY SUPPORTED AND ANY ALLEGED ERRORS BY YOUNG'S TRIAL COUNSEL DID NOT AFFECT THE OUTCOME OF THE TRIAL.

If, for the sake of argument, the actions of Young's trial counsel are considered to have fallen below a reasonable

level of competence, Young can still not satisfy the second prong of the *Strickland* test. In order to meet the requirements of the second prong of the *Strickland* test, Young must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. 668, 694. In determining whether or not this standard has been met, the Utah Court of Appeals has stated:

"In deciding whether a case should be remanded for retrial on the basis of ineffective assistance of counsel, 'an appellate court should consider the totality of the evidence, taking into account such factors as whether the errors effect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record.'"

State v. Strain, 885 P. 2d 810 (Utah App. 1994) (quoting *Templin*, 805 P. 2d at 187.)

In this case, the verdict is strongly supported by the evidence presented at trial. Even taken in their best light, as errors, rather than strategic decisions, the actions of Young's trial counsel related only to minor evidentiary issues and did not attack the strength of the City's case.

At the core of the City's case is the testimony of Lozano regarding Young's assault. Lozano testified that

Young's first action constituting an assault was a kick to Lozano's chest. (Trial Transcript, pages 87,90.) This testimony is not effected by any of the perceived errors now being alleged by Young. Lozano also testified that her fingers were injured by Young digging her fingernails into Lozano during the struggle for the car keys. (Trial Transcript, pages 88-90.)

Young now argues that her trial counsel was deficient in not presenting a medical expert to testify regarding the nature of the injuries to her hand. However, the testimony of this medical expert would have been of little benefit to Young. The expert's information contained in Young's affidavit confirms that Lozano did indeed suffer an injury to her fingers. This directly contradicts the testimony of Young that "I do not recall grabbing Miss-- Officer Lozano's hands". (Trial Transcript, page 156.) The fact that an injury occurred is also supported in the evidence by the testimony of both Officer Kishiyama and Officer Moore who testified they observed the injury to Lozano's hand when they arrived on the scene. (Trial Transcript, pages 55,72.) Finally, Young's other potential witness, EMT Glezos, would have presumably further buttressed the prosecution's position by testifying

that he had observed the injuries to Lozano, advised her how to care for the injury, and provided her with a bandaid. (Trial Transcript, page 96; Record, pages 110-114; Hearing Transcript, page 12).

Young's arguments regarding the failure to call EMT Glezos, the tow truck driver, and adequately interview Bobbi Johnson, all reflect instances which, even if they are to be considered to be errors, did not effect the outcome of the trial. For example, the proffered testimony of EMT Glezos would have at most produced two additional pieces of testimony. Glezos presumably would have testified that he observed no blood on Young and that Young was kneeling on the ground, in handcuffs, when he arrived. Neither of these pieces of evidence strike at the core of the City's case, nor do they add any evidence that was not already produced at trial. Bobbi Johnson testified that she observed Young lying face down on the ground (Trial Transcript, pages 109,119.), Young testified that she was kneeling (Trial Transcript, page 142.), and the officers testified that she was sitting (Trial Transcript, pages 55,71,93.). This issue, which is certainly not central to the crime committed, was already in dispute before the jury.

Similarly, there was already testimony from a City witness, Officer Moore, that he did not observe any blood on Young (Trial Transcript, page 72.). It's not surprising that some people at the scene did not see the relatively small amount of blood on Young, which Officer Lozano described as "a couple of dots" (Trial Transcript, page 96.). Glezos' testimony would not have produced evidence other than that already produced at trial. When the defendant has failed to demonstrate how further investigation by council would have produced evidence other than that already presented at trial, the defendant has failed to demonstrate how the additional investigation would have provided the defendant with sufficient information to alter the outcome of the trial. *State v. Baker*, 963 P. 2d 801 (Utah App. 1998).

The testimony of Bobbi Johnson and the tow truck driver were likewise not critical to the outcome of this trial. It is clear from her testimony that Bobbi Johnson did not see Young's assault on Officer Lozano. At best she saw certain portions of the aftermath. Since the description of the aftermath and the arrest have nothing to do with the offense, her testimony would not have affected the outcome of the trial. Similarly, the tow truck driver arrived on the scene

after the crime had occurred and any testimony that he or she may have provided would have been of little value.

Young's argument regarding the failure to investigate and present the effect of pepper spray on the defendant also would not have produced evidence other than that already presented at trial. Officer Kishiyama, Officer Moore, and Young all testified as to the effects of pepper spray. Further, Young's trial counsel argued and described the effects of pepper spray in both his opening and closing argument. Much like the appellant in the *Baker* case, cited above, Young has failed to demonstrate how additional investigation of the effects of pepper spray would have produced evidence other than that already presented at trial and how that additional evidence would have effected the outcome of the trial. *Baker*, at P.808.

Finally, Young alleges that her trial counsel's decision not to raise the protective order violation and decision to not plead to the Expired Registration charge were both errors by her trial counsel. In her brief however, she gives little explanation as to how these perceived failures would have caused the results of the trial to be different. At best,

each of these issues has the ability to cut both ways, both in favor of, and against Young's case.

For example, informing the jury that the protective order violation had been erroneously charged by Officer Lozano would have resulted in the jury also being informed that Young had been involved in a physical altercation with her ex-husband, however minor that physical altercation may have been. Similarly, the failure to plead to the charge of driving on Expired Registration would have removed that charge from the jury's deliberations, however it would have also limited the possible outcomes of the trial. The potential for finding guilt on the Expired Registration and acquittal on the Assault on a Police Officer, clearly a result that would have been more beneficial to Young, would have been eliminated. Neither of these strategic decisions by Young's trial counsel have anything to do with the charge of Assault on a Police Officer, nor did they affect the outcome of this trial.

CONCLUSION

The evidence relied upon by Young is not properly before this Court and should be disregarded. It consists of hearsay and new evidence contained in affidavits that were filed with

the trial court in support of a Motion for a New Trial. However, even if this information was admissible, it is still obvious that Young had competent legal counsel at trial and that her trial was fair.

All of the errors alleged by Young can be explained as obvious strategic decisions made by her trial counsel. Her trial counsel actively and aggressively defended Young at trial. He fully participated in jury selection. He subpoenaed the appropriate witnesses, although he chose not to use certain witnesses. He aggressively cross-examined the City's witnesses. He offered appropriate objections both during the trial and following closing argument. And, he passionately pleaded the facts of the case in both his opening and closing arguments. Young's trial counsel's performance did not fall below a reasonable level of competence in this case.

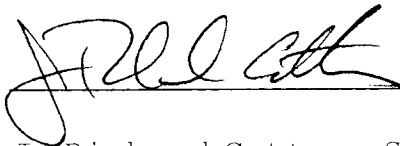
A review of the record also reveals that Young was not prejudiced by the actions of her trial counsel. Even if all of the evidence she perceives as being critical had been admitted at trial, the outcome of the trial would not have changed. The clear focus of the purported additional evidence is on the arrest and its aftermath. With the exception of

the evidence of the medical expert, none of this additional evidence has anything to do with the crimes she committed. With respect to the medical expert, at best his testimony would have disputed the extent of the injury to Lozano, not that an injury did or did not occur. The fact that Lozano suffered an injury was supported by substantial evidence at trial. None of the issues raised by Young would have effected the outcome of the trial below.

Young has failed to satisfy either prong of the *Strickland* test for ineffective assistance of counsel. She was more than adequately represented by counsel, her trial was fair, and the results of that trial should be affirmed by this court.

DATED this 21st day of January, 2000.

WEST VALLEY CITY



J. Richard Catten, Senior Attorney

Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 21st day of January, 2000, I served upon Delano S. Findlay, Attorney for Defendant/Appellant, two (2) copies each of the Brief of the Appellee, by causing said Briefs to be mailed to him, by first class mail, with sufficient postage prepaid, to the following addresses:

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